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No. 78-462

In the Supreme Court of the United States

OCTOBER TERM, 1978

JESSE H. OSBORNE, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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OPINIONS BELOW

The opinion of the Court of Claims' trial judge (Pet. App. 1a-35a) is not reported. The order of the Court of Claims modifying and adopting that opinion (Pet. App. 35a-37a) is not reported.

JURISDICTION

The judgment of the Court of Claims was entered on April 21, 1978. On July 25, 1978, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including September 18, 1978, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Army Board for Correction of Military Records improperly denied petitioner disability retirement pay.

STATEMENT

After serving 20 years in the United States Army, petitioner retired in March 1968. Several months before his discharge, he was given a full physical examination. The examination revealed a number of ailments, none of which was found serious enough to render petitioner unfit for military service (Pet. App. 4a, 19a).[1] Nine days before his discharge, petitioner applied to the Veterans Administration for disability benefits. A month later, after petitioner's retirement, the VA gave him a 10% service-connected disability rating on the basis of his ulcer. Petitioner's renewed claim for disability benefits prompted a VA physical examination in May 1968. The examination resulted in an additional 10% disability rating based on a finding that petitioner suffered from arthritis (*id.* at 20a-21a).[2]

In April 1969 petitioner applied to the Army for recall from retired status (Pet. App. 21a). He was given a physical examination and found qualified for recall. Petitioner returned to active duty in March 1970 and was assigned to duty in Vietnam. During his service there, petitioner complained of and received treatment for a variety of physical ailments (*id.* at 5a, 22a-23a). In

[1]The examination revealed that petitioner suffered from a duodenal ulcer, astigmatism, benign hypertrophy of the prostate gland, and athlete's foot.

[2]As the trial judge in the Court of Claims observed, the 20% disability found by the VA did not entitle petitioner to total benefits higher than his regular retirement pay. Although the 20% disability rating made petitioner eligible for veteran's disability benefits under either 38 U.S.C. 310 or 38 U.S.C. 331, applicable law provides that in order to receive such benefits, a person must agree to a reduction in his retirement pay in an equal amount. See 38 U.S.C. 3104(a), 3105; 38 C.F.R. 3.750. Thus, petitioner's objective in this litigation has not been to establish his entitlement to veteran's disability benefits but rather to show that his disability is of the kind that would entitle him to a higher rate of retirement pay. See note 3, *infra*.

September 1970 an Army medical board recommended a permanent limitation of petitioner's assignments to positions not involving field duty or prolonged standing or marching (*id.* at 23a). In October 1970 petitioner requested release from active duty and return to retired status. The request was approved in December 1970, and petitioner returned to retired status the following month. He did not receive a full physical examination before his release in January 1971 (*ibid.*).

Petitioner was again examined by the VA in April 1971. That examination produced no evidence of an ulcer and, accordingly, petitioner's VA disability rating was reduced to 10%, based on his continuing arthritis (Pet. App. 6a-7a, 24a-25a). In May 1972, after seeking the assistance of his Congressman, petitioner received a full military physical examination. The examination did not demonstrate that petitioner should have been retired for physical disability (*id.* at 6a, 23a-24a, 29a).

In September 1972 petitioner turned to the Army Board for the Correction of Military Records. He applied for a change in his records to indicate that he had been retired because of a disability of not less than 30% rather than because of his length of service (Pet. App. 3a, 7a, 24a).[3] In

[3]Petitioner apparently did not question that his original retirement in 1968 was a voluntary retirement based on length of service. See 10 U.S.C. 3914. Rather he sought to establish that, while on active duty after his retirement, he incurred "a physical disability of at least 30 percent for which he would otherwise be eligible for retired pay under [10 U.S.C. 1201]." Such a showing is necessary in order to bring petitioner within the coverage of 10 U.S.C. 1402(b). Coverage under Section 1402(b) permits a person initially retired under Section 3914 to compute his retirement benefits under 10 U.S.C. 1402(d) rather than under 10 U.S.C. 3991.

When a person has served more than 20 years in the armed forces, eligibility for retired pay under 10 U.S.C. 1201 does not require a showing of a disability of at least 30%. The person must show only that he has a permanent disability that renders him "unfit to perform

response to petitioner's application, the ABCMR requested and received from the VA all records pertaining to petitioner, including the records and reports of his Army and VA physical examinations (*id.* at 7a, 25a). The ABCMR also requested and received an advisory opinion from the Surgeon General. The opinion concluded that petitioner "is fit for retention and retirement" (*id.* at 7a, 27a).

Petitioner was represented before the ABCMR by counsel from the Disabled American Veterans. At counsel's request, he was permitted to examine all records concerning petitioner's military service and physical condition. After this review, counsel informed the ABCMR that the case would be "submitted on the evidence of record" (Pet. App. 7a, 27a, 30a).[4]

The ABCMR then received the written report of one of its own examiners, who reviewed petitioner's application and the records of his medical condition (Pet. App. 7a-8a, 27a-30a). The examiner concluded that petitioner "did not have a physical or mental impairment of such severity as to render him physically unfit for the performance of duty and warrant his retirement by reason of physical disability" (*id.* at 30a). The examiner also stated that

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the duties of his office, grade, rank, or rating * * *." Section 1402(b) imposes the additional 30% disability requirement for persons who have already been retired for reasons other than physical disability and then return to active duty and incur a disability that would justify their retirement under Section 1201.

Petitioner's insistence on establishing his coverage under Section 1402(b) is difficult to explain, because, as the trial judge in the Court of Claims observed (Pet. App. 3a n.2), it is not clear on the face of the statutes that petitioner's retired pay computed under 10 U.S.C. 1402(d) would be higher than that computed under 10 U.S.C. 3991.

[4]Petitioner's application for correction of records requested an opportunity for a personal appearance before the ABCMR (Pet. App. 7a).

"there is insufficient evidence of error or injustice in this case to warrant a recommendation for a formal hearing" (*ibid.*). In light of the examiner's comments and the announced willingness of petitioner's counsel to submit the case on the record, the ABCMR reviewed the written materials before it and in February 1973 denied petitioner's application for correction of records (*id.* at 8a, 24a).[5] The Adjutant General informed petitioner of the denial and stated (*id.* at 8a): "In the absence of new and material evidence tending to show existence of error or injustice in the military records, further consideration by the board is not contemplated."

Petitioner then filed this suit in the Court of Claims challenging the decision of the ABCMR. A trial was conducted, and the court adopted the opinion of its trial judge in all relevant respects.[6] The court held that decisions of the ABCMR should not be disturbed, unless a plaintiff shows by clear and convincing evidence that a decision is "arbitrary, capricious, unsupported by substantial evidence, or otherwise contrary to applicable law and regulations" (Pet. App. 10a). The court found that in this

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[5]In January 1973 the VA denied petitioner's request for a disability rating based on an alleged heart condition (Pet. App. 25a). The VA again determined that petitioner was entitled only to a 10% disability rating based on his arthritis (*id.* at 25a-26a). That determination was reaffirmed after petitioner underwent a special VA orthopedic examination in January 1974. In February 1976, after petitioner submitted the report of one or more examinations by a private orthopedic specialist, the VA increased his arthritis disability rating to 20%, effective retroactively to October 29, 1973 (*id.* at 7a, 30a-32a).

[6]The trial judge ruled sua sponte that the Court of Claims lacked jurisdiction under 28 U.S.C. 1491, because petitioner did not establish to a certainty that, if his alleged coverage under a different retirement provision were sustained, it would result in a higher rate of retired pay (Pet. App. 3a & n.2). Petitioner and the government agreed that this ruling was incorrect, and the Court of Claims indicated its rejection of the ruling by modifying the trial judge's opinion to omit all references to the jurisdictional point (*id.* at 36a-37a).

case petitioner fell far short of carrying his burden and in fact "presented no evidence showing he was unfit for retention or recall to military service at the time of either retirement" (*id.* at 11a). The court discerned no procedural defect in the ABCMR's handling of petitioner's request for correction of records. The court observed first that petitioner's counsel had waived an oral hearing, and second that the ABCMR is not obligated to provide an opportunity for oral argument when a person seeking correction of records fails to present some evidence of error or injustice (*id.* at 14a-16a). The court noted that, when asked at trial what he would have said if he had appeared before the ABCMR, petitioner responded that he would have stressed the Army's failure to give him a full physical examination immediately before his second separation from the service in January 1971 (*id.* at 15a). The court concluded that such a statement could not have affected the ABCMR's decision, because petitioner contended that his physical condition worsened after retirement and even the full examination conducted in May 1972 produced no evidence that petitioner should have been retired for disability (*ibid.*).

ARGUMENT

1. Petitioner contends (Pet. 7-12) that the ABCMR acted arbitrarily in denying his request for correction of records. The record provides no support for this contention. All the evidence before the ABCMR indicated that petitioner did not have a disability rendering him unfit for military service. Repeated physical examinations showed that petitioner was capable of further service in the Army and was fit for retirement. As the Court of Claims found, petitioner did not present any evidence, and certainly not "clear and convincing" evidence, that the ABCMR decision was arbitrary or capricious.

Petitioner's reliance on the testimony of a psychologist, private physicians, and his fellow workers is misplaced. This evidence was adduced at trial in the Court of Claims

but not before the ABCMR. The court correctly concluded that the trial testimony cast no doubt on the ABCMR decision, and that petitioner "is not now physically disabled to any substantial degree" (Pet. App. 11a). Even if the trial testimony established a disability, however, petitioner's remedy would be a new application for correction of records, not an attack on the denial of his 1972 application.

2. Petitioner argues (Pet. 12-17) that he is entitled to relief because he was not given a full physical examination before his return to retired status in January 1971. Even if the failure to conduct such an examination violated Army regulations, petitioner was not harmed. He received a full physical examination in May 1972, well before the ABCMR decision in February 1973. The examination indicated that petitioner was fit for retention or retirement. Petitioner does not suggest any way in which the timing of the examination affected the ABCMR decision.

3. Finally, petitioner complains (Pet. 17-22) that the ABCMR's failure to grant an oral hearing denied him due process. But petitioner's counsel waived an oral hearing and stated that the case should be submitted on the record (Pet. App. 27a). Furthermore, petitioner has not identified any additional evidence that he would have presented had a hearing been held. The ABCMR properly determined that petitioner did not "demonstrate the existence of probable material error or injustice." Under these circumstances, Army regulations permit the denial of an application for correction of records without a hearing. See 32 C.F.R. 581.3(c)(5)(ii). These regulations pose no constitutional problem, at least where the critical issue is one amenable to reliable resolution through written submissions. This Court has indicated that the existence and extent of medical disability are such issues. See *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). And, of

course, if petitioner believes that he has now accumulated new evidence of a disability incurred while he was on active duty in 1970, he is free to file a new application for correction of records with the ABCMR.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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